LAU PIANG NGONG

v.

ANG KOON KAU & ANOR.

HIGH COURT MALAYA, JOHOR BAHRU
MAHADEV SHANKAR J
[CIVIL SUIT NO. 12 OF 1980]
1 OCTOBER 1983

CIVIL PROCEDURE: *Pleadings - Whether party bound by its own pleadings - Road traffic accident - Negligence - Whether proven - Rules of the High Court 1980 O. 18 r. 7, O. 76.*

The plaintiff was knocked over from his motorcycle by an oncoming lorry which had collided with another lorry - whose trailer had become detached from the lorry at that point in time. Some six years later in his evidence in chief the plaintiff confirmed his police report that the trailer had detached itself from the defendants' lorry and collided into the oncoming lorry which in turn had collided into him. However the statement of claim stated that it was the defendants' disconnected trailer which had collided into the plaintiff's motorcycle. The defence Counsel sought to dismiss the claim based on this inconsistency in that the defendants' trailer had not knocked into the plaintiff and hence no negligence had been proven.

Held:

[1] That on the evidence adduced in Court negligence had been proven against the defendants.

[2] The defendants were aware of the police report at an early stage therefore notwithstanding the inconsistencies in the statement of claim and the evidence led, the defendants should have been on guard as to the plaintiff's case.

[3] There was more to the statement of claim than just the mere allegation of the plaintiff's motorcycle colliding with the defendants' trailer. The effect of the other paragraphs must also be considered and the statement of claim as a pleading should be taken not piece meal but as a whole.

[Judgment for plaintiff.]

Cases referred to:

Anjalai Ammal & Anor. v. Abdul Kareem [1969] 1 MLJ 22
Baker v. Market Harborough Industrial Estate Ltd. [1953] 1 WLR 1472
Ong Yam Chong & Anor. v. Chan Wah [1962] 28 MLJ 184
Haji Junus v. Chik & Anor. [1963] 29 MLJ 303
Playing Cards (M) Sdn. Bhd. v. China Mutual Navigation Co. Ltd [1980] 2 MLJ 182
KEP Mohd. Ali v. KEP M. Ismail [1981] 2 MLJ 10
Lever Brothers Ltd. v. Bell [1931] 1 KB 557
Farrell v. Secretary of State for Defence [1980] 1 All ER 166
Siti Aishah bte Ibrahim v. Goh Cheng Wai [1982] CLJ (Rep) 326
Esso Petroleum Co. Ltd v. Southport Corporation [1956] 2 WLR 81
Waghorn v. George Wimpey & Co. Ltd. [1969] 1 WLR 1764
John G. Stein & Co. Ltd. v. O'Hanlon [1965] AC 890
Burns v. Dixon's Iron Works Ltd. [1961] SC 102
Rawding v. London Brick Co. Ltd [1971] 10 KIR 207

Legislation referred to:

Rules of the High Court 1980, O. 18 r. 7, O. 76
Rules of the Supreme Court 1957, O. 19 r. 6

For the plaintiff - Subra Naicker; M/s. Subra Naicker & Co.
For the defendants - Dulip Singh; M/s. Dulip Singh & Co.

JUDGMENT

Mahadev Shankar J:

This case has necessitated a full examination of the parameters of the rule that a party is bound by his own pleadings and consequently should not be allowed to make out a case on the hearing of the action to the contrary.

The scenario follows. On 13 June 1977 the plaintiff, Lau Piang Ngong (hereafter referred to as Lau) left Singapore on his motorcycle No. JQ 6792 intending to go to Batu Pahat. At about 5.00 p.m. that day he arrived at the 25th Milestone Jalan Johore/Air Hitam Road. He was following a motorlorry-cum-trailer No. JM 4870. As can be seen from the sketch plan and key in the Agreed Bundle of Documents AB4 the plaintiff and the lorry-cum-trailer were approaching a left-hand bend. The lorry-cum-trailer was being driven by the defendant Ang Koon Kau (hereafter referred to as Ang). At the bend an accident took place involving Ang's lorry-cum-trailer and an oncoming motorlorry JJ 1058. I was informed by both Counsel from the Bar Table that the driver of that motorlorry JJ 1058 was killed in the accident. According to the Statement of Agreed Facts appearing at AB11 the road surface was dry, the weather condition was fine and visibility was good.

Ang made a report a few hours after the accident. It appears at AB12. He says in it that when he arrived at the scene of the accident his trailer detached itself from the lorry. He applied his brakes, stopped and saw that his trailer had been left about 400 yards behind. He then went to have a look and found blood on the left side of the road and that his trailer was damaged. He ventured no explanation in his police report as to how the trailer had become detached.

Lau sustained serious injuries from this accident. His report to the police was only made on 18 August 1977 and it appears at AB14. In it he says that at the scene of the accident he was about 50 feet behind. At that time the trailer of Ang's lorry came off, went into various directions, and collided with a lorry coming from the opposite direction. Lau stopped his motorcycle and went to the side of the road but the oncoming lorry which had already collided against the trailer, headed towards his direction and hit him. At the same time oil-palm fruits from this lorry fell over him. He collapsed unconscious.

On 26 November 1979 a statement of claim was filed for Lau by his solicitors. In view of the issues raised in this case paras. 3, 4 and 5 of the statement of claim are set out in full hereunder:

> 3. On 13 June 1977 at about 4 p.m. the plaintiff the rider of m/cycle No. JQ 6792 was travelling from the direction of Kulai towards that of Parit Buloh, following the 1st defendant the driver of m/lorry JM 4870 when on reaching at the 25th milestone Johore Bahru/Air Hitam Road, the trailer of m/lorry JM 4870 disconnected from the m/lorry and collided into the plaintiff's m/cycle and another m/lorry JJ 1058 travelling in the opposite direction.
>
> 4. The said collision was caused solely by the negligence of the 1st defendant in the driving, management and/or control of m/lorry JM 4870; who was driving the said m/lorry as the servant or agent of the Second Defendant or in the matter in which the 2nd defendant was interested or concerned.

PARTICULARS OF NEGLIGENCE OF THE FIRST DEFENDANT

a. Failing to keep any or any proper look-out;
b. Driving at an excessive speed in the circumstances;
c. Overloading the said m/lorry with iron-ore;
d. Failing to inspect the said m/lorry and the trailer of their road-worthy conditions;
e. Failing to observe or observe in time that the trailer of the said m/lorry had disconnected;
f. Failing to manage and/or control the said m/lorry to the trailer effectively;
g. Failing to secure properly and effectively the said trailer to the lorry; and/or
h. Failing to inspect or ensure whether the said trailer is effectively secured to the m/lorry.

5. By reason of the aforesaid negligence the Plaintiff had endured pain, suffered severe injuries and has been put to loss and expense.

Lau suffered some degree of mental instability as a result of the injuries he received in this collision.

The fact that this trial was taking place more than 6 years from the date of the accident was not exactly calculated to make it easier for human recollection.

In his evidence in chief Lau confirmed his police report. He stated that the trailer had snapped off Ang's lorry, collided into the oncoming lorry, and that oncoming lorry had then collided into him. He stated specifically that the trailer had snapped off before any collision had occurred between Ang's lorry and the oncoming lorry.

It is worthwhile emphasizing here that in para. 3 of the statement of claim the plaintiff had alleged that the trailer of Ang's lorry had disconnected and collided with Lau's motorcycle and another lorry JJ 1058. In other words the allegation here was that the trailer itself had collided with the plaintiff. This plea was contrary to what the plaintiff had said in his police report AB14.

Defence Counsel made the most he could of this inconsistency and focused all his energy in cross examination in merely reinforcing the fact that the trailer had not knocked into the plaintiff.

Ang was the only witness who gave evidence for the defence. His evidence in chief was the very soul of brevity. It was confined to a statement that there had been an accident between his lorry-cum-trailer and an oncoming lorry. The trailer had got disconnected after the accident.

No attempt whatsoever was made to explain how his lorry came to collide with the oncoming lorry or how the trailer came to detach itself from his lorry. In sum his evidence in chief about why or how the accident occurred as between his lorry and the oncoming lorry, was a blank.

In cross-examination of Ang, Mr. Subra Naicker obtained confirmation of the truth of Ang's report at AB12. It was pointed out to him that in his police report he had not made any mention of an oncoming lorry colliding with his lorry or trailer. Ang then confessed that he really did not know what had happened between his trailer and any oncoming lorry. He admitted that he was responsible for fixing the trailer to his lorry but was unable to explain why the trailer broke away.

On the strength of this evidence it was strenuously submitted by Encik Dulip Singh that since para. 3 of the statement of claim alleged that it was the trailer of Ang's lorry that collided into the plaintiff's motorcycle, and since no evidence had been given in Court to support this allegation, it followed that no negligence had been proved against the defendants and therefore the claim should be dismissed.

In addition to relying on what I said in *Miskinah's* case the defence also cited *Anjalai Ammal & Anor. v. Abdul Kareem* [1969] 1 MLJ 22.

The facts of that case are far removed from the present. There the issue was whether one Khatijah had acquired an indefeasible title by adverse possession of some land as was alleged in the pleadings. At the trial it appears that evidence was led to show, contrary to what was stated in the pleadings, that one Ooi Boon Kay had gone into adverse possession as agent of Khatijah. On the strength of this evidence and on contrary to the pleadings the trial Judge held that Khatijah had acquired indefeasible title.

The Federal Court reversed this decision holding that there had been a departure from the strict rules of procedure for deciding the case on an issue not raised in the pleadings and went on to hold that the claim should have been dismissed. I have noted that all the cases cited to the Federal Court in that appeal were decided between 1876 and 1895.

I invited defence Counsel to comment on the impact of the approach taken in *Baker v. Market Harborough Industrial Estate Ltd.* [1953] 1 WLR 1472 a case which has been consistently applied in the Malaysian Courts and on which application *Ong Yam Chong & Anor. v. Chan Wah* [1962] 28 MLJ 184 is but one example. These cases demonstrate that where there is a collision between 2 vehicles travelling in opposite directions then in the absence of special circumstances there is a *prima facie* presumption that both drivers are negligent and the onus falls on both of them to show that the other driver rather than himself was negligent.

Defence Counsel's response was that since the driver and owners of the motorlorry JJ 1058 had not been made parties to this action, any negligence on the part of Ang vis-a-vis the oncoming lorry was irrelevant since Ang's trailer had not collided with Lau's motorcycle. Defence Counsel urges that the plaintiff should have sued Ang, and the representatives of the driver and the owner of motorlorry JJ 1058 together or in the alternative and having failed to do so, the plaintiff was not entitled to succeed in this action.

Mr. Subra Naicker confessed that para. 3 of the statement of claim was a bit of a mess. However, he submitted that this was not fatal to his claim. He says that notwithstanding the inadequacies of para. 3 of the statement of claim the plaintiff is nevertheless entitled to succeed because he is entitled to rely not only on the pleadings but also the facts adduced at the trial.

The authorities upon which he relied were:

1. *Haji Junus v. Chik & Anor.* [1963] 29 MLJ 303
2. *Playing Cards (M) Sdn. Bhd. v. China Mutual Navigation Co. Ltd.* [1980] 2 MLJ 182
3. *KEP Mohd, Ali v. KEP M. Ismail* [1981] 2 MLJ 10
4. *Siti Aishah bt. Ibrahim v. Goh Cheng Wai* [1982] CLJ (Rep) 326

I shall now deal with these authorities in turn. In *Haji Junus'* case the plaintiff had brought an action to set aside a transfer of land which he claimed as beneficial owner on the ground that the defendant had acted in collusion with his transferor who already had a judgment given against her by way of specific performance for the transfer of the very same land in favour of the plaintiff. Section 43 of the Kedah Land Enactment provided that title is indefeasible except in cases of fraud or misrepresentation to which the registered owner is proved to be a party. The point was taken there that since the statement of claim did not in so many words allege fraud or misrepresentation, the defendant was entitled to have the claim dismissed on a preliminary objection. Suffian J (as he then was) relied on *Lever Brothers Ltd. v. Bell* [1931] 1 KB 557 at p. 582 where Scrutton LJ said:

> In my opinion the practice of the Courts has been to consider and deal with the legal result of pleaded facts, though the particular legal result alleged is not stated in the pleadings, except in cases where to ascertain the validity of the legal result claimed would require the investigation of new and disputed facts which have not been investigated at the trial.

He went on to hold that if the facts alleged by the plaintiff and admitted by the second defendant were believed it was up to the Court to infer the legal result which the plaintiff sought to put on them. It was not necessary for the plaintiff to specifically use the words fraud or misrepresentation and so on. *Shaw v. Shaw* was also referred to. So long as the material facts were alleged it was stated to be sufficient for the Court to proceed to judgment without putting any particular legal label upon the cause of action.

As a concession to the defence it may be stated that the Court in *Haji Yunus'* case took a lenient view of the pleadings because the East-coast rules were designed to simplify legal procedures for an unsophisticated peasantry and furthermore did not contain anything like O. 19 r. 6 of the Rules of the Supreme Court, 1957 which required misrepresentation or fraud to be pleaded with great particularity.

In *Playing Cards (M) Sdn. Bhd. v. China Mutual Navigation Co. Ltd.* [1980] 2 MLJ 182 the plaintiff's complaint was that goods he ordered had not been shipped on the vessel named in the Bill of Lading issued in his favour. Instead the goods had been shipped on some other vessel which arrived much later. Damages were claimed for non-delivery and the Court of first instance held that on the pleadings the claim for damages could not succeed since the goods had in fact been delivered. In the Federal Court, Abdoolcader J (as he then was) held that even though the statement of claim had not been ideally drafted it contained adequate information to appraise the defendant of the case which was being made against him and that since the evidence adduced at the trial was along the same lines the Court did not think that the defendant had been taken by surprise and was therefore unable to meet the appellant's case or was unable to meet the nature of the claim advanced.

The Court distinguished the position there from what occurred in *Farell v. Secretary of State for Defence* [1980] 1 All ER 166, a decision which calls for separate treatment in this judgment.

The next decision was that of *KEP Mohd. Ali*. Here the problem was that the plaintiff had brought an action to recover a debt due to him under a deed of compromise. The defendant pleaded limitation. In his reply the plaintiff pleaded that the law of limitation had no application to the case. He did not specifically plead therein that there had been an acknowledgment in writing of the debt which revived time and thereby neutralised the plea of limitation. In the judgment of the Federal Court given by Raja Azlan Shah CJ Malaya (as he then was) it was held that whilst the plaintiff's pleadings were bad in respect of the omission to plead the acknowledgment either in the statement of claim or the reply, nevertheless, "this aspect of the case has been satisfactorily presented and developed in the proceedings before the High Court and we think there are materials on the record from which decision to that effect could be arrived at."

Mr. Subra Naicker understandably placed considerable reliance on this passage and appeared to suggest that it mattered not that a fact was not alleged in the pleadings. It sufficed if the point was developed by evidence given at the trial.

The last judgment of *Siti Aishah bte Ibrahim* was nearer home. There it was pleaded that the plaintiff was lawfully walking along the proper side of the road. In her police report and in her evidence in Court the plaintiff stated that she was walking across the road. The defendants sought to non-suit the plaintiff on the ground that her case was not supported

by her pleadings. The Federal Court held on the facts of that case that the defendant was not misled, prejudiced, embarrassed, or in any way taken by surprise, or led astray by the plaintiff's pleading because from the very outset it was the contention of and the case of the defendant that the plaintiff was walking across the road and not along the road.

In its judgment the Federal Court distinguished the case of *Minah bte Sulong v. Lim Soo & Anor.* (Federal Court Civil Appeal 36/70) on the facts. It then proceeded to deal with the *Esso Petroleum Co. Ltd. v. Southport Corporation* [1956] 2 WLR 81. In so doing the Federal Court appears to have placed some emphasis on the passage appearing at p. 82 where Karl Jowitt stated, *inter alia*, that the ship owners who were the defendants could not be held responsible.

> because they did not negative a possible case which was not alleged against them in the pleadings **nor made against them in the course of trail.**

Since the words emphasized were emphasized by the Federal Court in *Siti Aishah's* case Mr. Subra Naicker also emphasizes them and contends that the proper construction to be put upon these words is that it is open to the plaintiff to make out a case against the defendants not only as stated in the pleadings but that he has a further option to making a case against the defendants at the trial and if the defendants do not negative that case the plaintiff is entitled to judgment.

I would state it as my view with the greatest respect to all concerned that to put the proposition in this way is to put it far too wide.

What then is the limitation of the nature and scope of evidence led in a trial to support a claim made on the pleadings?

The starting point is of course O. 18 r. 7 of the Rules of the High Court which states that:

> Every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim ... but not the evidence by which those facts are to be proved.

As has already been stated in the *Supreme Court Practice* 1979 Vol. I at p. 260 the interpretation of these words is a matter of skill and experience. The object is to give the other party adequate notice of the case intended to be set up and prevent him being taken by surprise.

Waghorn v. George Wimpey & Co. Ltd. [1969] 1 WLR 1764 was a useful decision on the scope of the O. 18 r. 7. It was there held that where the evidence at the trial establishes facts different from those pleaded by the plaintiff as constituting negligence, which are not just a variation, modification, or development of what has been alleged but which constitute a radical departure from the case as pleaded the action will be dismissed. It is not possible to compress the facts of that case into a small compass without some distortion but briefly the plaintiff's case on his pleadings was that the defence had been negligent in maintaining a primitive earth-work bank which the plaintiff had to cross fairly frequently. It was alleged that this bank and the slope beside it were dangerously slippery. The evidence at the trial however was to the effect that the accident had occurred nowhere near the bank but at some other place by the side of the caravan. Accordingly the Court held that the version of facts given at the trial was not just a diversion, modification or development but was something new, separate and distinct and not merely a technicality, and that there had been so radical a departure from the pleaded case as to disentitle the plaintiff to succeed. Had the case been pleaded in accordance with the facts advanced at the trial the defendant's preparation

and presentation would have been different. Since there was no evidence of any negligence with regard to the siting of the caravan or the side of the path beside it the claim was dismissed.

At p. 1771 Geoffrey Lane J also placed a caveat on the application of this rule by stating that:

> ... if matters emerge, particularly matters of technicality which perhaps could not be foreseen by those responsible for cases, and those things emerge through a case, then it would be quite wrong to dismiss a plaintiff's claim because his pleadings have not measured to the technical facts which have emerged. One often listens sympathetically to applications to amend in those circumstances. Here, however, there is nothing technical at all. A man is said to have slipped. There is nothing technical about that.

There was no application by Mr. Subra Naicker to amend the pleadings in the present case. Indeed, more than 6 years have lapsed from the date of the accident to the date of the trial. It may well be too late to make any amendment.

In *Waghorn's* case the Court referred to a Scottish decision which went up to the Privy Council. This was *John G. Stein & Co. Ltd. v. O'Hanlon* [1965] AC 890. That case concerned an allegation of breach of statutory duty but there was some disparity between the pleadings and the evidence led at the trial as to the location where the alleged breach occurred. The arguments advanced in that case are instructive. Suffice it to refer to the test set out by Lord Justice Clarke Thompson in *Burns v. Dixon's Iron Works Ltd.* [1961] SC 102, 107-108 where he said:

> The Court is often charitable to records and is slow to overturn verdicts on technical grounds. But when a pursuer fails completely to substantiate the only ground of fault averred, and seeks to justify his verdict on a ground which is not just variation, modification or development of what is averred but is something which is new, separate and distinct, we are not in the realms of technicality.

The application of this test in the case of *John G. Stein* was amply illustrated in the judgment of Lord Guest [1965] AC 909 where he said:

> The question is whether the case upon which the respondent succeeded was covered by the pleadings. I have no doubt that the respondent failed to establish the case of a longstanding over-hang some 30 feet from the corner. But in the way in which the evidence came out this became immaterial when the accident was proved to have taken place at about the corner ... Although this finding was to some extent a variation or modification of the respondent's case on record, it was based upon the same ground of fault and it related to the facts as found by the Lord ordinary upon evidence properly before him. There was not, in my view, such a radical departure from the case averred on record as would justify the House in absolving the appellants from liability.

If I may now turn to the salient features of the case before me I would begin by stating that in his police report which was in the Agreed Bundle at AB14, Lau stated quite categorically that the trailer had detached itself from the lorry, gone into various directions, and collided against the oncoming lorry. Lau had stopped his motorcycle and gone to the side of the road but the oncoming lorry which knocked against the trailer headed in his direction, hit him and the oil palm fruits from his lorry also fell down over him.

The manner in which the defence was conducted left me in doubt that they were aware of this police report at a very early stage. What the plaintiff had said in his first statement to the police should not have come as a surprise.

In my view, notwithstanding the inconsistencies between para. 3 of the statement of claim and this report, they should have been on guard against the possibility that Lau would be repeating this evidence in Court.

There was, however, more to the statement of claim than just para. 3.

The effect of paragraphs 4 and 5 must also be considered and the statement of claim as a pleading should be taken not piece meal but as a whole.

Paragraph 4 alleged that the collision was caused solely by the negligence of the 1st defendant, Ang, in driving or management of the lorry. In the particulars which followed specific mention was made under paras. 4D, E, F, G and H of the negligence of the 1st defendant in failing to inspect the trailer for road-worthiness, securing the same properly and effectively to the lorry, and to maintain observation at the material time when the trailer had disconnected.

The plaintiff's cause of action was in negligence. The legal result which the plaintiff was seeking to show from the facts pleaded was that the 1st defendant had failed in his duty of care to the plaintiff which failure had resulted in the injury and damage which he suffered.

I am satisfied on the evidence before me that all the particulars of negligence alleged against Ang with regard to the failure to inspect and/or to secure and/or thereafter to observe the behaviour of the trailer have been proved on the balance of probabilities.

At the risk of repetition I would recapitulate that it was strenuously submitted by Mr. Dulip Singh that since the evidence proved beyond a preadventure that the only collision in which the plaintiff was directly involved was not with the trailer but with the oncoming lorry, no case had been made out at the trial to show any negligence on the part of the defendant consistent with the plaintiff's pleadings which had resulted in the damage to the plaintiff. He further submitted that the circumstances which led to the impact between the trailer and the oncoming lorry had not been pleaded and that the evidence given at the trial of impact between trailer and oncoming lorry and thereafter between the oncoming lorry and the plaintiff was a new case which he was not obliged to rebut.

Had Counsel addressed their minds to the independent evidence by way of the sketch plan and key, the issues would undoubtedly have been more easily resolved. It has been left to the Court to look into the implications of this evidence and I make the following findings of fact. Ang's lorry-cum-trailer was approaching a left-hand bend. Lau says that his speed was below 30 m.p.h. and that he had been following Ang's lorry about 50 feet behind for some distance.

Therefore it is safe to imply that Ang was also going at a speed of just below 30 m.p.h. The road at the scene had a double yellow line in the centre. This was an absolute prohibition against any overtaking or encroachment.

Of the utmost significance on the Sketch Plan were 2 scratch marks G-G1 and L-L1. These marks are stated to be scratch marks caused by the trailer of Ang's lorry. The scratch mark G-G1 is 10 feet long. It starts on the correct side of the road a few feet from the centre line and proceeds until it reaches the double yellow line. There is then a short break and the scratch mark once again commences at L-L1 in the same direction for a distance of 16 feet. At L it is 2 feet from the centre on the wrong side of the road and at L1 is 5 feet from the road centre. From this evidence I infer that the trailer was out of control a few feet from the centre into the wrong side. I further infer that the collision occurred between the trailer and the oncoming lorry at some point beyond the double yellow line on the wrong side of the

trailer's road because the final position of the trailer shown on the plan as K and the positions of the motorlorry JJ 1058 leaves me with no other reasonable option on the balance of probabilities.

The next significant point is that the distance between the trailer and the oncoming lorry at their final resting places was 65 feet. The motorcycle was found on the verge. A speed of 30 m.p.h. is equivalent to 44 feet per second. Since we have evidence that the 2 collisions which are the subject matter of this action followed each other in rapid succession the time gap between them could at best have been between 1-2 seconds. In other words looking at the big picture, this was a case of one big accident involving 3 vehicles in which there were 2 impacts. It was all part of the same *res gestae.*

The defendant has advanced no explanation whatsoever as to why or how this collision occurred. Applying the approach taken in *Baker v. Market Harborough,* I must find that Ang was at least 50% to blame. Putting it at its lowest, therefore, I make a positive finding that Ang's negligence caused and/or contributed to this accident. Since the owners of and/or the representative of the deceased lorry driver of the oncoming motorlorry are not parties to this action it is not necessary for me to proceed to apportion blame for the first impact between Ang and the deceased lorry driver. Suffice it to say that any redemption of Ang's conduct seems remote to vanishing point when one considers the position of the scratch marks L-L1.

The next issue of course is whether the injuries and damage to the plaintiff were a direct result of the defendant's negligence. Here I would observe that the plaintiff was in every respect an innocent bystander. Until the collision occurred between the oncoming lorry and the trailer he was proceeding perfectly happily along the road. Immediately after the collision the oncoming lorry mowed him down. I find it as a fact that the collision between the lorry JJ 1058 and the plaintiff's motorcycle was the direct result of the collision which immediately preceded it between the oncoming lorry and the defendant's trailer.

It matters not in what proportion liability should be distributed between the defendant and the oncoming lorry. A 1% finding of negligence against the defendant would have sufficed to entitle the innocent plaintiff to succeed wholly. I hold that it was the first impact which directly caused the second impact. In the circumstances there must be judgment for the plaintiff against the defendant.

To sum up, I do not agree with defence Counsel that the case advanced at the trial was not supported by the statement of claim. Admittedly paragraph 3 was unhappily worded but paras. 4 and 5 were adequate to put the defendants on guard against the case they had to meet at the trial. In addition to the pleadings there was also the plaintiff's police report. They had been put on notice and should have come to Court fully prepared to meet an allegation of negligence, the core of which was that by failing to secure the trailer effectively to the motorlorry they had caused an accident which resulted in the collision of their vehicle and a lorry and a further collision involving the plaintiff's motorcycle. I hold further that on the evidence and the pleadings before me it is not open to the defendants to say in this Court that they were taken by surprise. If the defendants chose not to explain how the trailer had become detached they adopted that course at their peril.

This Court cannot be expected to non-suit a plaintiff who had suffered very serious injuries for no fault of his own, merely because para. 3 of his statement of claim did not measure up to perfect standards.

In case the defendants are minded to challenge the findings that I have made or the law as I have expounded it I would add the following.

Farrell v. Secretary of State for Defence is distinguishable because the case made out at the trial was an allegation of negligence against a person who was not a party to the proceedings. No negligence had been proved against the defendants themselves and the Court held accordingly that the plaintiff was not entitled to succeed on such pleadings. The allegations of negligence against some other person not a party to the proceedings was of course a total departure which was impermissible.

A similar situation arose in *Rawding v. London Brick Co. Ltd.* [1971] 10 KIR 207. There evidence was led that the critical act of negligence was that of a fellow workman for which the plaintiff's employers were vicariously liable. This act was not pleaded in the statement of claim as it stood and the allegations pleaded failed on all counts. The Court of first instance allowed the plaintiff to amend the statement of claim to take in the new act of negligence proven in the course of the trial. The Court of Appeal held that the amendment was wrongly allowed and that since the new allegation formed no part of the facts pleaded in the statement of claim it should not have been taken into account in deciding the issue of liability.

In the last analysis, it seems to me that the test is one of consistency. A plaintiff does not have *carte blanche* to lead evidence at the trial which is neither consistent nor compatible with the pleadings.

I do not also agree with the defence Counsel that it was imperative for the plaintiffs to sue the defendants and the driver and owner of the oncoming lorry cumulatively or in the alternative. Where a party suffers damage as a result of tort committed by a number of joint tort-feasors the plaintiff can opt to choose that target which is most convenient from his point of view either for tactical reasons or because the defendant chosen has the deepest pocket. All he needs to show is one evidence of negligence against the chosen defendant leaving the latter with his remedy for a contribution or an indemnity against the other tort-feasors.

Finally on the issue of quantum the parties had agreed that general and special damages should be in the sum of RM50,000.

There will accordingly be judgment for the plaintiff against the defendants for this sum in addition to interest on the descretal amount up to the date of realisation.

However, our troubles do not end here. In this case the plaintiff was advised to attend for psychiatric treatment about a month after the accident. His behaviour then was certainly abnormal. At the hearing a medical report was produced from the head of the Department of Neuro-surgery, General Hospital, Kuala Lumpur. This report is dated 28 February 1983. It relates the history of the plaintiff's case and goes on to state that:

> Since recovery, he has been given to some abnormal behaviour. This has been documented by the psychiatrist and people around him ... I am inclined to think that these changes in all likelihood could continue to bother the patient and interfere with his being meaningfully employed in an intellectual capacity in the future.

Now O. 76 of the Rules of the High Court provide for the matters to be observed where a claim is being made by a "person under disability". Such a person is defined by O. 76 r. 1 to mean a person who is an infant or a patient. "Patient" means a mentally disordered person within the meaning of the Mental Disorder Ordinance, 1952.

In Part I of the Mental Disorder Ordinance 31/52 a "mentally disordered person" means any person found by due course of law to be 'of unsound mind and incapable of managing himself or his affairs."

Where the Court has before it evidence to show that the plaintiff has a history of post-traumatic personality disorder which is said by his own neurologist to be capable of continuing to bother him, the Court cannot shut its eyes to the very real possibility that this plaintiff may well be incapable of managing himself or his affairs by reason of unsoundness of mind.

Before the Court makes any orders for the payment over of the damages awarded it seems appropriate that Counsel should now address their minds to this aspect of the case and address the Court further on the appropriate orders that should be made in the circumstances.

The Court would also invite Counsel to make the necessary submissions on the costs of and arising out of this action and also the date from which interest should run on the decretal amount.

The matter will therefore be adjourned to another date for Counsel to call such further evidence as they think fit and to make such submissions as may be thought necessary.

After receiving further medical evidence from a consultant psychiatrist to the effect that the plaintiff's present mental state is quite compatible with a normal/independent life in the community, and hearing the submissions of Counsel on 1 October 1983 I am now satisfied that it is in order to direct that the damages be paid over by the defendants to the plaintiff.

Accordingly I now make an order that the defendants do pay to the plaintiff the sum of RM50,000 as general and special damages with interest thereon at 8% per annum from the date of the service of the writ up to realisation. I also order that the cost of this action (which will include the costs of obtaining the further medical evidence) be taxed and paid by the defendants to the plaintiff.

Also found at [1984] 1 CLJ 259